UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.

Before
E.E. GEISER, L.T. BOOKER, J.K. CARBERRY
Appellate Military Judges

UNITED STATES OF AMERICA

v.

NICHOLAS W. GORHAM
AIRMAN APPRENTICE (E-2), U.S. NAVY

NMCCA 200301077
SPECIAL COURT-MARTIAL

Sentence Adjudged: 27 August 2002.
Military Judge: CDR Ronald N. Johnson, JAGC, USN.
Convening Authority: Commanding Officer, USS NIMITZ (CVN 68).
Staff Judge Advocate's Recommendation: CDR L.B. Sullivan, JAGC, USN (10 Dec 02); LCDR M.F. Guarin, JAGC, USN (9 May 05); LCDR D.G. Fuller, JAGC, USN (29 Jun 09; 15 Jul 09).
For Appellant: LCDR Anthony S. Yim, JAGC, USN.
For Appellee: Maj Elizabeth A. Harvey, USMC.

24 November 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PER CURIAM:

The appellant was convicted, pursuant to his pleas, by a military judge sitting as a special court-martial of conspiracy to import ketamine into the United States; unauthorized absence; possession of drug abuse paraphernalia; use of ketamine, methamphetamine, and ecstasy on various occasions; and importation of ketamine into the United States, violations, respectively, of Articles 81, 86, 92, and 112a of the Uniform Code of Military Justice, 10 U.S.C. §§ 881, 886, 892, and 912a. His approved sentence extended to confinement for 6 months,

forfeiture of $737.00 pay per month for 6 months, reduction to pay grade E-1, and a bad-conduct discharge from the U.S. Navy.

The appellant alleges two errors. First, he asserts that he was denied due process through the near 7-year delay between his trial and the convening authority's (CA's) action; and second, he claims that the staff judge advocate's recommendation (SJAR) contained "new matter" which should have been referred to him before the CA acted. Having carefully considered the record and the pleadings of the parties, we find no error that is materially prejudicial to the substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ.

Due Process Denial From Lack of Speedy Review

We initially received this record of trial in May 2003, some 9 months after trial. As the record did not contain an authentication page, we returned the record for proper authentication and new post-trial processing on 5 January 2005. The ordered actions were accomplished, but the new SJAR was not properly served upon defense counsel. After further correspondence between the Navy and Marine Corps Appellate Review Activity and the CA, yet another SJAR and draft CA's action were prepared and were properly served upon the substitute defense counsel (SDC). The CA took action on 15 July 2009[1] and the case was redocketed before this court in August 2009.

Notwithstanding that this case was tried prior to *United States v. Moreno*, 63 M.J. 129, 135-36 (C.A.A.F. 2006), we nonetheless find, consistent with that case, that the delays in this case are facially unreasonable. The delays bespeak inattentiveness by all participants, save the appellant. Given the lengthy delay evident from the record, we will assume a due process violation and consider whether the Government has met its burden of showing the violation was harmless beyond a reasonable doubt. *United States v. Allende*, 66 M.J. 142, 145 (C.A.A.F. 2008); *United States v. Allison,* 63 M.J. 365, 370 (C.A.A.F. 2006). We consider whether constitutional error is harmless beyond a reasonable doubt *de novo* based on the totality of the circumstances. *United States v. Bush*, 68 M.J. 96, 102-03 (C.A.A.F. 2009).

The appellate defense counsel asserts in argument that the appellant was prejudiced by the delay because lack of a discharge certificate hampered his efforts to join a municipal fire department. Counsel offers no evidence from the fire department in question and, in fact, does not even offer an affidavit from the appellant. We reiterate that the argument of counsel is not evidence. *Cf. Allende,* 66 M.J. at 145 (holding that in absence

[1] As the Government correctly notes in its brief, the CA did not withdraw his May 2005 action when he issued his July 2009 action. In both the 2005 and 2009 actions, the CA approved the adjudged sentence. We will order the necessary corrective action.

of documents regarding employment processes or valid reason for not supplying them, assumed error was harmless beyond a reasonable doubt).

We have considered the totality of the circumstances -- the entire record of trial, the responsibility for various aspects of the post-trial delay, the appellant's post-trial employment and family history, and the parties' arguments -- and conclude that the Government has proven beyond a reasonable doubt that the due-process violation is harmless. In reaching this determination, we place no burden upon the appellant to disprove the harm; rather, we note that his counsel's assertion of possible employment prejudice is just that, an argument of counsel.

We next consider whether this is an appropriate case to exercise our authority to grant relief under Article 66(c), UCMJ, in light of *Toohey v. United States*, 60 M.J. 100, 101-02 (C.A.A.F. 2004), *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002), and the factors articulated in *United States v. Brown*, 62 M.J. 602, 607 (N.M.Ct.Crim.App. 2005)(en banc). Having done so, we find the delay does not affect the findings or the sentence that should be approved in this case of a Sailor who imported and used ketamine and who joined with other Sailors in this criminal activity. We thus decline to grant relief.

New Matter in the Supplemental SJAR

We find that the 15 July 2009 SJAR reflecting disagreement with the appellant's argument does not constitute a "new matter" and therefore need not have been referred to the SDC before the CA acted.

We believe that "new matter" properly includes specific derogatory facts, a new legal analysis, or other matters to which the appellant might properly respond. *See generally United States v. Roop*, 37 C.M.R. 232, 234 (C.M.A. 1967); *United States v. Sarlouis*, 25 C.M.R. 410, 412 (C.M.A. 1958). As the parties correctly note in their briefs, "new matter" is not clearly defined in the MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) or in the case law. We observe, however, that "new matter" is not normally interpreted to include a "discussion by the staff judge advocate or legal officer of the correctness of the initial defense comments on the recommendation." RULE FOR COURTS-MARTIAL 1106(f)(7), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Discussion. A simple expression of disagreement with the appellant's stated position is not of such a "potentially pivotal nature," *United States v. Gilbreath*, 57 M.J. 57, 62 (C.A.A.F. 2002), as to warrant any relief for the failure to refer the matter to the appellant for comment. The appellant has appropriately raised the delay as a matter for appellate review and has been afforded the process due in such cases.

We acknowledge the salutary effect of R.C.M. 1106, insofar as it prevents the Government, purposely or inadvertently, from

inserting information (*e.g.*, inadmissible evidence of "stale" nonjudicial punishments) that should not properly factor into the CA's decision-making. In this regard, though, the appellant has made no "colorable showing of possible prejudice," *United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998). He also fails to state what, if anything, would have been submitted to "deny, counter, or explain' the new matter." *United States v. Chatman*, 46 M.J. 321, 323 (C.A.A.F. 1997)(quoting *United States v. Leal*, 44 M.J. 235, 237 (C.A.A.F. 1996)). No relief is therefore warranted in this case.

Conclusion

The prior CA's action of 09 May 2005 is set aside. The findings and the approved sentence reflected in the 15 July 2009 CA's action are affirmed.

For the Court

R.H. TROIDL
Clerk of Court